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No. 06-1308

In the Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY, ET AL.,
PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The "program integrity" regulation issued by the Legal Services Corporation, 45 C.F.R. 1610.8, requires recipients of federal funds to maintain "physical and financial separation" between the federally-funded entity and any affiliate that engages in restricted activity with non-federal funds. The question presented is whether the "program integrity" regulation is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 462 F.3d 219. The opinion of the district court (Pet. App. 36a-46a) is reported at 356 F. Supp. 2d 267. An earlier memorandum and order of the district court (Pet. App. 47a-145a) is reported at 349 F. Supp. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2006. A petition for rehearing was denied on December 28, 2006 (Pet. App. 146a-147a). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, Congress enacted the Legal Services Corporation Act of 1974, 42 U.S.C. 2996 *et seq.* That Act created the Legal Services Corporation (LSC) as an independent, non-profit corporation to provide financial assistance to programs that furnish legal assistance to the poor. 42 U.S.C. 2996e(a)(1)(A). LSC grantees also often receive funds from state and local governments and private sources. Pet. App. 4a.

Congress has long imposed restrictions on the activities that LSC recipients may undertake. In 1996, Congress enacted new restrictions. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321. The new restrictions place limits on representing undocumented aliens, collecting attorney's fees, soliciting clients, lobbying, and bringing class action lawsuits. See, *e.g.*, § 504(a), 110 Stat. 1321-53. Congress has reenacted the restrictions in annual appropriations acts since 1996. See, *e.g.*, Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 502(a), 110 Stat. 3009-59. The Act applies these prohibitions not only to recipients' use of LSC funds, but also to their use of non-federal funds from state and local governments and private donors. See 1996 Act §§ 504(d)(1) and (2), 110 Stat. 1321-56, 1321-56 to 1321-57.

Soon after enactment of the restrictions, a district court in Hawaii granted a preliminary injunction against enforcement of the restrictions as applied to a grantee's use of non-LSC funds on the ground that they likely violated the First Amendment as so applied. *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997). In response to that decision, LSC promulgated the program integrity regulation that petitioners chal-

lenge here. 62 Fed. Reg. 12,101 (1997). That regulation allows grantees "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds." *Id.* at 12,102.

Under the regulation, an affiliate of an LSC grantee may spend non-federal funds on restricted activities as long as the affiliate maintains its "objective integrity and independence" from the grantee. 45 C.F.R. 1610.8(a). Objective integrity and independence are deemed to exist where (1) the affiliated organization is "legally separate" from the grantee; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities;" and (3) the affiliate is kept "physically and financially separate" from the grantee. 45 C.F.R. 1610.8(a)(1)-(3).

The regulation specifies that "[w]hether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts." 45 C.F.R. 1610.8(a)(3). The relevant factors include, but are not limited to, (1) "[t]he existence of separate personnel;" (2) "[t]he existence of separate accounting and timekeeping records;" (3) "[t]he degree of separation from facilities in which the restricted activities occur, and the extent of such restricted activities;" and (4) "[t]he extent to which signs and other forms of identification which distinguish the recipient from the [affiliated] organization are present." 45 C.F.R. 1610.8(a)(3)(i)-(iv).

The Hawaii district upheld the program integrity regulation against a First Amendment challenge. *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 981 F. Supp. 1288, 1293-1298 (D. Haw. 1997). The Ninth Circuit affirmed, *Legal Aid Society* v. *Legal Services Corp.*, 145 F.3d 1017

(1998) (White, J., sitting by designation), and this Court denied a petition for a writ of certiorari. 525 U.S. 1015 (1998).

2. In January 1997, petitioner Legal Services of New York City and others (*Velazquez* plaintiffs) filed suit challenging the program integrity regulation on, *inter alia*, First Amendment grounds. Pet. App. 6a. The United States intervened to defend the constitutionality of the LSC program. The district court rejected plaintiffs' First Amendment claim. *Velazquez* v. *Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997).

The court of appeals affirmed in part and reversed in part. *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 759 (2d Cir. 1999), aff'd in part, 531 U.S. 533 (2001), and cert. denied in part, 532 U.S. 903 (2001). The court rejected the *Vesazquez* plaintiffs' facial challenge to the program integrity regulation, explaining that the government may impose restrictions on recipients of federal funds as long as it allows adequate alternative channels for constitutionally protected activity. *Id.* at 765-766. The court left open the possibility of an as-applied challenge. *Id.* at 767. The court also held that a substantive provision refusing to fund claims to amend or change existing law constituted impermissible viewpoint restriction. *Id.* at 769-772.

This Court affirmed the Second Circuit's viewpoint discrimination holding. *Velazquez* v. *Legal Servs. Corp.*, 531 U.S. 533 (2001). The Court denied review on all other issues. 532 U.S. 903 (2001).

3. On remand, the *Velazquez* plaintiffs pressed their as-applied challenge in the district court. Pet. App. 8a. Another group of plaintiffs (including petitioners South Brooklyn Legal Services and Farmworker Legal Services of New York) brought a separate action challeng-

ing the program integrity regulation, and the two cases were consolidated. *Ibid.*

Petitioners thereafter submitted a proposal to LSC, seeking approval to create "affiliates" that would engage in restricted activities with non-LSC funds. Pet. App. 9a. The proposal, as clarified, would have created affiliates that would occupy the same offices, and use the same attorneys, the same support staff, and the same equipment as the three LSC recipients. C.A. App. 804-808. LSC rejected the proposal, concluding that the proposed 100% sharing of physical space, equipment and staffs, demonstrates that the proposal as a whole fails to provide the requisite physical and financial separation. Pet. App. 9a.

Finding that petitioners had established a "probability of success" on their as-applied challenge to the program integrity regulation, the district court issued a preliminary against enforcement of the regulation. Pet. App. 144a-145a. Applying an "undue burden" balancing test, the court concluded that the burdens of satisfying the program integrity regulation are substantial, and that the government's interests in not subsidizing the restricted activities and in avoiding the appearance of government support for those activities are not sufficiently weighty to justify those burdens. *Id.* at 126a-144a.

4. As relevant here, the court of appeals vacated the district court's decision and remanded for further proceedings. Pet. App. 16a-29a, 35a. The court of appeals first held that the district court erred in adopting an "undue burden" test for assessing the constitutionality of the program integrity regulation that was drawn from cases where the government directly burdened certain constitutional rights. The court concluded that the un-

due burden standard applied in those cases is not the correct test for assessing the constitutionality of conditions on funding. *Id.* at 19a-20a.

The court of appeals next held that, in applying its undue burden standard, the district court had incorrectly required the government to establish that the program integrity regulation was the "least-restrictive-means" for serving the government's interests. Pet. App. 20a. The court concluded that the least-restrictive-means standard applies to direct regulation cases, not to government funding cases. *Ibid.* In the funding context, the court explained, the relevant means-ends inquiry is whether "the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the market place." *Id.* at 21a.

The court of appeals then held that the proper standard for assessing the constitutionality of the funding condition must focus on whether the plaintiffs have "adequate alternative channels for protected expression." Pet. App. 24-25a. The court explained that "restrictions that unduly burden the ability of an organization to set up adequate alternative channels for protected expression such that they are in effect precluded from doing so should be subject to invalidation." *Id.* at 25a-26a. The court concluded that the district court had failed to determine whether "the potential alternative channels were adequate in light of burdens imposed." *Id.* at 26a. The court therefore remanded to the district court to "make factual findings under the adequate alternative test * * * and consider whether the associated burdens in effect preclude the plaintiffs from establishing an affiliate." *Id.* at 27a.

ARGUMENT

Petitioners seek review of the court of appeals' decision vacating the district court's entry of a preliminary injunction against enforcement of the program integrity regulation and remanding for further factual findings on whether the regulation leaves adequate available channels for petitioner to exercise their First Amendment rights. The decision below is interlocutory, and there is no reason to depart from the general rule that this Court will review only final judgments. In any event, the court of appeals' holding is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (The Court generally should not review interlocutory order absent "extraordinary" circumstances.); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some * * * unusual factor, the interlocutory nature

of a lower court judgment will generally result in a denial of certiorari.").

This case is doubly interlocutory. First, the district court did not enter a final judgment on the constitutionality of the program integrity regulation as applied to petitioners. Instead, it entered a preliminary injunction against enforcement of the regulation as applied to petitioners based on a finding that petitioners had established a "probability of success" on the merits of their as-applied challenge. Second, the court of appeals did not even finally dispose of petitioners' request for a preliminary injunction. Instead, the court of appeals vacated the district court's grant of a preliminary injunction and remanded for the district court to make factual findings on whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in activity protected by the First Amendment. Pet. App. 27a, 35a.

Nor does this case present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for immediate review by this Court. Even if petitioners were correct that a finding on whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in protected activity is not as important to the constitutional analysis as the court of appeals deemed it, it is plainly relevant to the analysis. Accordingly, it would be premature to review the validity of the program integrity regulation without a finding on that issue. Moreover, if, on remand, petitioners establish that there is not an adequate alternative channel for engaging in protected activity, the issue they now seek to present would become moot. On the other hand,

should petitioners not prevail on the adequate alternative issue, they will be able to challenge the district court's determination on that issue in the court of appeals. And, if the court of appeals affirms, petitioners may then seek this Court's review, challenging the determination on the adequate alternative channels issue as well the court of appeals' holding that such an inquiry is required. Especially in these circumstances, there is no reason for the Court to deviate from its normal practice of denying review of interlocutory orders.

Proceedings in the district court may also help to clarify other related factual issues that may be relevant to the constitutional analysis. For example, petitioners complain that the program integrity regulation imposes unwarranted burdens based on the assumption that the regulation requires that no physical space may be shared and at most one attorney may be shared. The regulation, however, does not impose either requirement. See Legal Services Corp. Br. in Opp. 13-14. A remand would permit the district court to make a finding on the true costs of complying with the regulation. For that reason as well, review of the court of appeals' interlocutory decision on the propriety of the district court's entry of a preliminary injunction would be premature.

2. In any event, the court of appeals correctly held that the district court erred in failing to undertake an inquiry into whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in protected activity. That holding is consistent with this Court's decisions on the scope of Congress's authority under its spending power.

In *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983), the Court held that Congress could reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations. In so holding, the Court explained that such an organization would be free to create an affiliate to conduct its lobbying activities without tax-deductable contributions. *Id.* at 544. Given that alternative, the Court concluded that Congress had not infringed any First Amendment right to engage in lobbying activity, but had instead simply chosen not to pay for lobbying activities. *Id.* at 546.

In *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court invalidated a law providing that noncommercial television and radio stations that receive federal grants may not engage in editorializing. The Court explained that the vice of the law was that it absolutely barred the recipient from editorializing with wholly private funds. *Id.* at 400. The Court added that if Congress were to permit recipients to establish affiliate organizations that would use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would be valid. *Ibid.*

In *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991), the Court explained that *League of Women Voters* and *Regan* establish that Congress may not use its spending power place a condition on a recipient that "effectively prohibit[s] the recipient from engaging in * * * protected conduct outside the scope of the federally funded program." Applying that principle, the Court upheld a regulation that barred grantees from engaging in abortion counseling as part of the federal program, but allowed the grantees to engage in such counseling through

programs that were separate and independent from the grantees' federally assisted programs. *Id.* at 196-198.

Consistent with those cases, the court of appeals correctly concluded that petitioners could not establish that the program integrity regulation is invalid simply because operating a separate and independent program would impose additional costs and burdens. As the court of appeals explained, a showing of such additional burdens is relevant, but the ultimate inquiry is whether petitioners are in effect prevented from establishing an adequate alternative channel for engaging in protected activity. Pet. App. 25a-26a.

Only one other court of appeals has addressed the question of the appropriate standard for evaluating the constitutionality of the program integrity regulation, and it has reached the same conclusion as the court below. In *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (1998), the Ninth Circuit held that the program integrity regulation does not violate the First Amendment because "[a] recipient of LSC funds may engage in conduct protected by the First Amendment outside the scope of the federally funded program if, as in *Rust*, the recipient sets up a separate entity that complies with the program integrity regulations." The court explained that the "proper constitutional test" focuses on "whether the regulations 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *Id.* at 1026 (quoting *Rust*, 500 U.S. at 197). The court of appeals also acknowledged that "[p]resumably, the restrictions make it more difficult for organizations to engage in prohibited activities," but noted that "the fact that the LSC restrictions may require additional compliance ef-

forts" was insufficient to warrant their invalidation. *Id.* at 1027.

3. Petitioners offer no reason why the Court should grant review at this interlocutory stage. Nor do they assert that there is any conflict in the circuits that would warrant review. Instead, petitioners seek review based on the assertion that the court of appeals adopted an incorrect legal standard for evaluating the constitutionality of the program integrity regulation. Even if that claim had merit, it would not provide a basis for reviewing an interlocutory decision that does not conflict with a decision of any other court of appeals. In any event, petitioners' claim lacks merit.

a. Petitioners contend (Pet. 16-20) that, under this Court's decisions, a separate and independent affiliate requirement is permissible only if the costs and burdens associated with the creation of an affiliate are insubstantial. But the only majority opinion petitioners cite (Pet. 17-18) merely stated in a footnote that a separate incorporation requirement was "not unduly burdensome." *Regan*, 461 U.S. at 544 n.6. Petitioners err in contending that the "ease" of establishing an affiliate was "crucial" to the that decision. Because the grant recipient did not claim that it was unduly burdened in operating an affiliate, the Court did not purport to define what kind of burden would be constitutionally permissible. And while three justices joined a concurring opinion suggesting that further restrictions would have raised constitutional problems, *id.* at 552-553 (Blackmun, J. concurring), that opinion, by definition, did not speak for the Court.

Petitioners also vastly overstate (Pet. 18) the significance of this Court's observation in *League of Women*

Voters, 468 U.S. at 400, that it would "plainly be valid under the reasoning of [*Regan*]" for Congress to provide, as a condition on the receipt of federal funds, that a subsidized entity must form a separate affiliate that could "use the station's facilities" to editorialize with non-federal funds. A statement that a particular arrangement would plainly be valid under the Constitution in no way suggests that a different arrangement in a completely different context is unconstitutional.

Petitioners also err in contending (Pet. 18-20) that the court of appeals' holding is contrary to *United States* v. *American Library Ass'n*, 539 U.S. 194 (2003) (*ALA*). That case did not address the existence of adequate alternative channels of expression, because the Court held that the statute did not impose a substantial burden on First Amendment rights in the first place. The plurality in that case held that a statute requiring libraries, as a condition of federal funding, to install software to block obscenity and child pornography did not violate the First Amendment rights of the libraries or their patrons. *Id.* at 208-214. The plurality explained that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance." *Id.* at 212.

Petitioners rely on Justice Kennedy's concurring opinion in *ALA*. But that concurring opinion merely stated that if a librarian can unblock filtered material upon request, "there is little to this case." *Id.* at 214 (Kennedy, J., concurring). Contrary to petitioners' assertion (Pet. 19), Justice Kennedy did not state that "a plaintiff would be entitled to an as-applied First Amendment exemption" upon a showing that it would be unduly burdensome to unblock websites or disable filters. He

merely stated that if some libraries are unable to disable the filtering software or "if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject of an as-applied challenge." *Id.* at 215 (Kennedy, J., concurring). A statement that a particular set of circumstances may give rise to an as-applied challenge does not constitute a holding that anything more than an insubstantial burden violates the Constitution. And Justice Kennedy's opinion did not purport to address the very different context presented here.

Petitioners also fail to come to grips with the decision in *Rust*, which upheld regulations that are virtually identical to the regulations at issue here, which have governed the LSC program for ten years. Relying on this Court's decision in *Velazequez*, petitioners argue (Pet. 20-21) that *Rust* is not controlling because that case involved a program funding government speech rather than private speech. But "*Velazquez* held only that *viewpoint-based* restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors." *ALA*, 539 U.S. at 213 n.7 (emphasis supplied). If the Court in *Velazquez* had instead intended a sweeping change in the law for all cases involving the legal services program, the Court would presumably have vacated and remanded the Second Circuit's decision on the restrictions at issue here, rather than denying certiorari immediately after deciding *Velazquez*. See p. 4, *supra*.

b. Petitioners also contend (Pet. 15) that the court of appeals erred in holding that the program integrity regulation can be upheld even if it is unrelated to any legiti-

mate justification. The court of appeals, however, held no such thing. The court of appeals recognized that the government's asserted interests are not irrelevant to the constitutional analysis, and that "[w]hen the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the marketplace, then relief may indeed be appropriate." Pet. App. 21a.

The court of appeals did hold that the district court had engaged in an inappropriate assessment of the government interests furthered by the program integrity regulation. But that was because the district court had engaged in an inquiry into whether the program integrity regulation constituted the least restrictive means of serving the government's legitimate interests. Pet. App. 20a. That aspect of the court of appeals' decision is correct. No decision of this Court addressing the validity of funding conditions suggests that such conditions are invalid unless they serve the government's legitimate interests through the least restrictive means. Petitioners do not cite any case that supports such a least-restrictive-means inquiry in the funding context.

Moreover, there is an appropriate fit between the program integrity regulation and the interests it is designed to further. For example, Congress has a legitimate interest in ensuring that the legal services organizations that they fund devote their energy and resources to providing the basic legal services funded by the statute. That interest is furthered by a requirement that lawyers working on LSC-funded cases focus on those cases. Congress could reasonably conclude that lawyers that split their time between funded activity and non-

funded activity would not as effectively accomplish the activities that Congress sought to fund. By prohibiting the practice of using 100% of the same lawyers to perform funded and unfunded work, the program integrity regulation appropriately furthers that legitimate interest.

The government also has a substantial interest in preventing public confusion about whether the government supports a particular activity. See *Rust*, 500 U.S. at 188; *League of Women Voters*, 468 U.S. at 395. Petitioners contend (Pet. 22) that this interest can be furthered in other ways. But as discussed above, in the funding context, the government is not required to pursue its interests through the least restrictive means.

In any event, petitioners err in contending (Pet. 22) that disclaimers and signs are fully adequate to dispel public confusion. Those measures do not address general public perceptions. Under the district court's injunction, an LSC-funded legal services provider could use the same lawyers in the same office to handle both restricted and non-restricted cases. If a citizen were to learn through the media that a particular provider is handling a major redistricting case, there is a significant risk that the citizen would not distinguish between the LSC grantee and its affiliate, and would believe that the litigation is being funded with a federal grant despite the statutory prohibition on such activity.

Petitioners contend (Pet. 23-24) that the government was required to follow the same approach that it follows in "charitable choice" programs that govern the receipt of funds by faith-based organizations. But the two programs serve different objectives. The charitable choice programs are designed to ensure that "all eligible orga-

nizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance used to support social programs." Exec. Order No. 13,279, 3 C.F.R. 259 § 2(b). In that context, separation requirements serve the limited purpose of ensuring that government does not fund inherently religious activity in violation of the Establishment Clause of the First Amendment. The LSC program integrity regulation, by contrast, is designed to ensure that funds are spent only to support the activities Congress wished to fund, to ensure that those who receive LSC funds maintain their primary focus on the LSC program's core mission, and to ensure that there is not public confusion about whether the government supports activities outside that core mission.

c. Petitioners' contention (Pet. 27) that the program integrity regulation imposes viewpoint-based restrictions is insubstantial. Restrictions on representing undocumented aliens, collecting attorney's fees, soliciting clients, lobbying, and bringing class actions are plainly viewpoint neutral.

4. Finally, petitioners suggest (Pet. 13) that certiorari should be granted because the LSC restrictions "severely impede" the operation of more than 100 legal services programs. But petitioners have never asserted that they cannot form affiliates—they simply believe it would be inefficient to do so, despite the substantial federal subsidies made available through the LSC. Moreover, contrary to petitioners' assertion (Pet. 8), many legal services organizations have successfully formed and operate affiliates consistent with the program integrity regulation. See C.A. App. 901-902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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